



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **BAIL APPLN. 3705/2020 &**
+ **BAIL APPLN. 4187/2020**

Order reserved on:07.03.2022
Date of decision : 31.05.2022

EBERA NWANAFORO Petitioner

Through: Mr.Sumit Sarna, Advocate

Versus

NARCOTICS CONTROL BUREAU Respondent

Through: Mr.Subhash Bansal, Sr.
Standing Counsel for NCB
with Mr.Shashwat Bansal,
Advocate

AND

FRANK VITUS Petitioner

Through: Mr.Ajay Verma, Advocate

Versus

NARCOTICS CONTROL BUREAU Respondent

Through: Mr.Subhash Bansal, Sr.
Standing Counsel for NCB with
Mr.Shashwat Bansal, Advocate

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. The applicants, Ebera Nwanaforo (applicant of Bail Appln. No. 3705/2020) and Frank Vitus (applicant of Bail Appln. No. 4187/2020)



seek the grant of bail in SC No. 9148/2016 submitting to the effect that they have been incarcerated since 21.5.2014 when they were arrested at the Main Road, Mahipalpur, Delhi by the NCB officials in front of Hotel International Inn and a case was registered under Sections 8, 22, 23 & 29 of the NDPS Act, 1985 against them. The applicants submit that they have clean antecedents and have never been involved in any criminal case of any nature and are respectable persons.

2. It is further submitted by the applicants that on 21.5.2014, some samples were allegedly recovered from a black coloured bag with the marking 'DELL' which was carried by the co-accused Eric Jayden and no such contraband material was recovered from the applicants at the time of their arrest and that they were arrested on the statement under Section 67 of the NDPS Act, 1985 of the co-accused Eric Jayden from whom the said black colour bag with the marking "DELL" was recovered from which the contraband material was recovered. The applicants further submit that there is no document that the prosecution has put forth on the record to show that the black coloured bag with the marking 'DELL' which was carried by the co-accused Eric Jayden from which the 1.900 Kgs of contraband material was recovered belonged to the applicants and the applicants reiterate that they have no concern or connection with the material recovered. The applicants further submit that they have been incarcerated for more than 8 years now.

3. The applicants submit that as per the status report dated 9.1.2021 submitted by the NCB in Bail Appln. No. 3705/2020 till the



said date, out of the cited 34 witnesses as per the complaint, 12 witnesses had been examined and whereas as per the submission of the status report dated 10.3.2021 in Bail Appln. No. 4187/2020, 13 witnesses had been examined. Both the applicants have submitted that none of the witnesses examined so far have testified in relation to any recovery of any contraband from their possession.

4. It is submitted on behalf of the applicants that as per the complaint submitted by the NCB itself there was no averment in relation to any specific recovery of any contraband from the applicant Ebera Nwanaforo (applicant of Bail Appln. No. 3705/2020) and that even in relation to the alleged recovery of two blue coloured drums containing a liquid substance from the ground floor of the RZG-50-51, G Block, Raj Nagar Part-II, Palam Colony 559/4 New Delhi which had been allegedly rented out to the accused Frank Vitus (applicant of Bail Appln. No. 4187/2020) which was alleged to contain Phenyl-2-Propane, the CRCL report received as per the complaint itself opined that the said samples were not found positive for Phenyl-2-Propanone and are found positive for cellulose and calcium carbonate.

5. It is also submitted by the applicants that the alleged recovery 1.450 Kgs of Methamphetamine from the search of the room No. 402, 4th Floor of H. No. 4/74-A, 402, Bengali Colony, Mahavir Enclave, New Delhi, was recovered from the co-accused Christian Chukwuma and not from the applicants. The applicants submit that even for the invocation of Section 29 of the NDPS Act, 1985 there needs to be some direct evidence or circumstances which show more than *prima facie* that there was a conspiracy between two persons. The applicants



place reliance on the verdicts of the Hon'ble Supreme Court in ***Sujit Tiwari V. State of Gujarat &Anr.***; dated 28.10.2020 in Criminal Appeal No. 1897/2019 and SLP (Criminal) 3478/2019 and ***Ranjit Singh Brahamjit Singh Sharma V. State of Maharashtra***; 2005 AIR SCW 2215 which relates to the provisions of Section 21(4) of the MCOCA, 1999, submitting to the effect that the said provision is in *pari materia* with the provisions of Section 27 of the NDPS Act, 1985, wherein the Hon'ble Supreme Court has held in favour of presumption of innocence being a human right.

6. Notice of the applications had been issued to the respondent Narcotics Control Bureau (NCB) and the status reports dated 9.1.2021 and 10.3.2021 were submitted by the NCB.

7. As per the complaint that was filed by the NCB against the accused persons, named, Eric Jayden, Ebera Nwanaforo (the applicant of Bail Appln. No. 3705/2020), Frank Vitus (applicant of Bail Appl. No. 4187/2020) and Christian Chukwuma, it was submitted that on 21.5.2014 Sh. C.S.K.Singh, the Intelligence Officer, NCB, DZU, received a secret information to the effect that three African persons were coming to deliver some drug at Hotel International Inn, Mahipalpur, New Delhi in a Swift Dezire Taxi Car bearing No. HR 66A 4681 and if a search was conducted there was a possibility of recovery of psychotropic substances in a huge quantum which information was reduced into writing by Sh. C.S.K.Singh and the same was put up before Mr. Ravi Shankar Joshi, Superintendent, NCB, DZU for directions whereafter Mr.Ravi Shanker Joshi directed



Sh. Ajay Dahiya, Intelligence Officer to constitute a team and to take necessary action as per law.

8. It has been submitted further through this complaint that Sh. Ajay Dahiya, Intelligence Officer constituted a team of the NCB officers and left in a government vehicle bearing registration No. DL-2C-1168 along with the NCB seal No. DZU-4 and other necessary material for the spot near Hotel International Inn, Mahipalpur, New Delhi, and reached there at about 1305 hrs and on reaching there contacted the passersby to join as public witnesses but none of them agreed and the surveillance was mounted and about 1600 hrs a Swift Dezire Taxi bearing No. HR 66A 4681 came to the spot and stationed in front of the gate.

9. As per this complaint, the taxi was surrounded and stopped by the team of NCB officers and the driver of the taxi introduced himself as Kailash Yadav and the three passengers therein with their names as being Eric Jayden, Ebera Nwanaforo (the present applicant) and Frank Vitus (the applicant of Bail Appln.No. 4187/2020), i.e., accused No.1,2 and 3) and the accused Eric Jayden had a black coloured bag with the marking/name 'DELL' written on it. As per the complaint, the NCB officers disclosed their identity and the secret information available with them to the passengers and the driver and requested the taxi driver to be an independent witness of the proceedings to which he agreed, whereafter a notice under Section 50 of the NDPS Act, 1985 was served upon the three accused separately and they were apprised of their legal rights to get the search effected in the presence of a Magistrate or a Gazetted Officer qua which they stated to the



effect that they did not want the presence of any such Magistrate or Gazetted Officer. As per the said complaint filed by the NCB in the Court of the Special Judge, NDPS, there was nothing incriminating recovered from the personal search of the three accused but the search of the bag with the marking 'DELL' which was with the accused No.1 Eric Jayden, two transparent packets were found and both of them were opened and they were found to contain a white crystalline substance and a small quantity was taken from both of them and tested with the Field Testing Kit which gave positive result for Methamphetamine and since the substance of both the packets was similar in colour, texture, test and appearance, they were transferred into transparent polythene and on weighing it was found to be 1.900kgs.

10. Two samples of 25 gms each were stated to have been drawn and kept in small zip lock pouches which were marked separately and given the mark A1 and A2 and sealed with the seal of the Narcotics Control Bureau, DZU-4 with the remaining substance also having been put into the same bag with the mark 'DELL' with packing material and the seal DZU-4 and marked A.

11. Inter alia, it was stated that the recovered substance was seized vide Panchnama dated 21.5.2014 and a test memo was prepared and the specimen seal was affixed on the same.

12. As per the complaint filed by the NCB after the said seizure, Mr.Kailash Yadav, the driver of the taxi informed that he had brought the accused Nos. 1,2 and 3 from H-4/74A, Flat No.402, Bengali Colony, Mahavir Enclave, New Delhi-45 and he further stated that



there was a possibility there would be more narcotics available in that premises if a search was made which information was reduced into writing by Ajay Dahiya, the Investigating Officer, and after completion of the Panchnama the same was put up before Sh. Ravi Shanker Joshi, Superintendent, NCB, DZU for directions who directed Mr.Sandeep Kumar, Investigating Officer to constitute a team and take necessary action as per law whereupon a team of the NCB Officer along with the taxi driver, Kailash Yadav left the NCB office in a government vehicle bearing registration No.CH-01 GA 5143 along with the necessary material required for seizure to the spot i.e. H-4/74A, Flat No.402, Bengali Colony, Mahavir Enclave, New Delhi-45 and reached there at about 7 p.m. and on reaching there the taxi driver Kailash Yadav pointed out to the house and the NCB officers contacted Sh. Ritesh Arora, the landlord of the said house and disclosed their identity and the purpose of their visit asking him to become an independent witness of the proceedings to which he agreed.

13. As per the complaint, the NCB team went to the flat No.402 at the fourth floor, the door of the flat was knocked and it was opened by one Christian Chukwuma to whom the NCB officers disclosed their identity and purpose of their visit and also showed their search authorization. Two friends of the accused No.4 Christian Chukwuma, named, Henry and Ebuka were found there and the purpose of the visit was apprised to them and notice was served under Section 50 of the NDPS Act, 1985, to the accused No.4, i.e., Christian Chukwuma whereupon he was apprised of his legal rights that he could have the



search conducted in the presence of a Magistrate or Gazetted Officer to which he responded that he did not need any such presence of a Magistrate or a Gazetted Officer and allegedly stated that any NCB officer could take their search.

14. As per the complaint, during the search conducted nothing incriminating was recovered from the accused No.4 Christian Chukwuma, but a yellow coloured bag was recovered during the search of the room and hall and during the examination of the said yellow coloured cloth carry bag, a transparent packet was recovered from the same which on opening was found to contain a crystalline substance and a little quantity of it was taken and tested with the Field Test Kit which gave positive result for Methamphetamine. The transparent material was transferred into a transparent polythene and on weighing it was found to be 1.450 Kgs and two samples of 25 gms each were drawn and kept in a small zip lock pouch and were sealed with the seal of the NCB and remaining material was put into a cloth pulanda marked A and sealed with the seal of the Narcotics Control Bureau, DZU-5.

15. The said alleged seizure is stated in the complaint of the NCB to have been effected in terms of the NDPS Act, 1985. The said Christian Chukwuma accused No.4, as per the complaint, is stated to have informed Mr.Sanjay Mehta, the Investigating Officer, that some stuff was lying at RZG-5051, G Block, Raj Nagar Part-II, Palam Colony 559/4, New Delhi which was the residence of accused Frank Vitus (the applicant of Bail Appln. No. 4187/2020) which information was reduced into writing and after completion of formalities, Sh. Amit



Kumar Sharma, the Investigating Officer, constituted a Team of the NCB officers and reached RZG-5051, G Block, Raj Nagar Part-II, Palam Colony 559/4, New Delhi and thereafter after conducting procedures they visited the house and found the ground floor and the first floor of the premises locked and the landlord and the key of the premises could not be located as a consequence of which the lock of the first floor was broken and nothing was recovered in the search. Thereafter the lock of the ground floor was broken and during the search, two blue coloured drums containing a liquid substance were recovered and a little quantity was taken from both the drums which tested positive for Phenyl-2-propane. The samples were drawn and marked A1/A2 and B2/B2 by the NCB whereafter the search was conducted of the adjoining room and on the ground floor, four yellow sacks containing a white substance were recovered and that the sacks had the words Micro Crystalline Cellulose written on the same with the address of the manufacturers and all the four sacks were found to contain similar substances of similar texture, nature and colour and two samples were drawn from the same and they were sealed and a seizure memo was prepared.

16. During the inquiry of the case, as per the complaint, summons under Section 67 of the NDPS Act, 1985 were issued to the accused persons and in response to the summons they appeared before the NCB officers and tendered their respective voluntary statements under Section 67 of the NDPS Act, 1985 wherein they admitted the recoveries and their involvement in the drug peddling and other incriminating facts. Kailash Yadav, the taxi driver was also stated to



have been summoned under Section 67 of the NDPS Act, 1985, and he tendered his voluntary statement and disclosed about the role played by him during the investigation of the case. He also stated that Eric Jayden (accused No.1) took the packets with him in the black coloured bag having the marked 'DELL' and used to supply a white coloured powder to some Nigerian and in turn used to take money from them.

17. As per the complaint accused No.2, Ebera Nwanaforo (applicant of Bail Appln. No. 3705/2020) admitted in his voluntary statement under Section 67 of the NDPS Act, 1985 that he knew that Eric Jayden was involved in the drug business and he stated that Eric Jayden and Frank Vitus came to Mahipalpur to deliver Methamphetamine to a party and in turn they were to get \$15000.

18. As per the complaint, accused No.3, Frank Vitus (the applicant of Bail Appln. No. 4187/2020) admitted in his voluntary statement under Section 67 of the NDPS Act, 1985 that Eric Jayden was involved in drug business and stated that he along with Eric Jayden and Ebera Nwanaforo had come to Mahipalpur to deliver Methamphetamine to a party and in turn they were to get \$15000.

19. It has been submitted through the complaint filed by the NCB that the accused No.1 Eric Jayden admitted in his voluntary statement under Section 67 of the NDPS Act, 1985 that he came to India on a business Visa and was dealing in watches, belts, valets etc. and he started drug business with one Michael in Nawada and that he was also involved in the trafficking of multiple drugs and supplying them to Indian drug buyers.



20. The accused No.4 Christian Chukwuma is stated to have admitted in his voluntary statement under Section 67 of the NDPS Act, 1985, that he had come to India on a business Visa and stated that Eric kept the drug (seized from his house) in his house and had been paying him some money for the same.

21. Inquiries are also stated to have been conducted by the NCB from one Henry (friend of accused no.4 Christian Chukwuma), Nand Kishore, owner of the ground floor and first floor of RZG-5051, G Block, Raj Nagar Part-II, Palam Colony 559/4 New Delhi who was also summoned by the NCB under Section 67 of the NDPS Act, 1985 and he tendered his voluntary statement wherein he allegedly disclosed that he rented this premises to accused No.3 Frank Vitus.

22. Inter alia the NCB submits that during the course of inquiry it was found through the CRCL reports that the samples tested positive for Methamphetamine Hydrochloride qua recoveries effected near the Hotel International Inn and at the residence of the accused No.4 Christian Chukwuma. Through the complaint submitted by the NCB, it has also been stated that the call details of the mobile phones of the accused persons were obtained and it was revealed that all the accused persons were in touch with each other. The NCB has thus submitted through its complaint that all the accused persons were indulged in the trade and export of psychotropic substances and had committed offences punishable under Sections 8, 22,23,28 & 28 of the NDPS Act, 1985. **However the complaint filed by the NCB vide para 40 thereof indicates that the samples in respect of the recovery effected at the Ground and First Floor of RZG-5051, G Block,**



Raj Nagar Part-II, Palam Colony 559/4 New Delhi, indicated that the samples were not found positive. The samples drawn from the two blue coloured drums containing liquid substance from the premises allegedly let out to the applicant Frank Vitus (applicant of Bail Appln. No. 4187/2020) as per the CRCL reports were found to have not tested positive for Phenyl-2-propanone but were found positive for cellulose and calcium carbonate.

23. Through the status report dated 9.1.2021 in response to the Bail Appln. No. 3705/2020 of the applicant Ebera Nwanaforo, the NCB has stated as under:

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6	<i>Date, time & Place of incident</i>	<i>Upon secret information, search was conducted on 21-05-2014 three persons namely Frank Vitus, Ebera Nwanaforo and Eric Jayden near Hotel International Inn, Mahipalpur, New Delhi who had come in Swift Dezire Taxi bearing No. HR66A 4681 to the spot for delivery of contraband. From the search of black colour bag held- by co-accused Eric</i>



		Jayden, a recovery of 1.900 Kg of Methamphetamine was seized. Upon ongoing investigations, it was revealed by Taxi Driver Kailash Yadav that the said accused persons had come from Mahavir Enclave, New Delhi. Accordingly, search of house H4/74, Bengali Colony, Maharvir Enclave, New Delhi, was conducted in the presence of public witness. During search of Room No. 402 at 4th Floor, in the said building Christian Chukwuma was found to be residing and from the search of room a yellow-coloured cloth bag was found which was having a transparent ploythene packet containing contraband- 1.45 Kg. Methamphetamine. Therefore, total recovery of contraband is 3.350 kg Methamphetamine seized from the accused persons arrayed in the complaint. Total Seizure- 3.350 Kgs. Methamphetamine (Commercial Quantity)
7 --11	...	...
12	Part played by accused and injuries caused to the	Recovery of 1 Kg.900 gms Methamphetamine from the



	<i>respondents</i>	<i>accused persons Eric Jayden, Frank Vitus and Ebera Nwanaforo, which was seized from the bag held by Eric Jayden. It is submitted that in his voluntary statement tendered under section 67 NDPS Act, accused Ebera Nwanaforo disclosed that he went to Mahipalpur along with co-accused person for delivery of drug for monetary consideration of \$15000/-. Besides that he also disclosed that he knew the accused Eric Jayden that he is involved in the drug trafficking and the deal which was to be executed at the concerned Hotel near Mahipalpur on 21-5-2014 was settled for a amount of \$15000/-. The accused Christian Chukwuma has also stated in his statement that he knows Eric Jayden had kept drugs in the bag. From the bag seized from Christian Chukwuma— 1.450 Kg. Methamphetamine was recovered.</i> <i>All the accused persons were in conspiracy for drug-trafficking of the seized</i>
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		<i>contraband.</i>
13-27		...
28	<i>Whether any extra-judicial confession made? If yes, when before whom</i>	<i>Voluntary Statement under Section 67 NDPS Act tendered by Ebera Nwanaforo.</i>
29-30		...
30A	OTHER CORROBORATIVE EVIDENCES	1. <i>Public witness and the Voluntary Statements u/sec. 67 tendered by public witness of seizure which was effected from the possession of accused persons.</i> 2. <i>CDR of Mobile nos. of accused persons.</i> 3. <i>From where accused persons had taken taxi i.e. House H4/A74, Bengali Colony, Mahavir Enclave, upon search of Room No. 402, seizure of contraband 1.450 Kgs Methamphetamine from possession of accused Christian Chukwuma. Voluntary Statement u/sec.67, NDPS Act of accused.</i> 4. <i>CRCL Report-sample tested</i>



		<i>positive for Methamphetamine. And other witnesses including Official witnesses.</i>
31-35		

24. The NCB has further submitted that the charges have already been framed vide order dated 21.4.2015 by the learned Special Judge, NDPS, in SC No. 27/2014, qua the alleged commission of offences punishable under Section 29 of the NDPS Act, 1985 and under Section 22 (c) read with Section 29 of the NDPS Act, 1985 pursuant to recovery of 1.900 Kgs of Methamphetamine from Eric Jayden, Ebera Nwanaforo and Frank Vitus whilst traveling in a Swift Dezire car bearing No. HR 66A 4681 on 21.5.2014 at about 1600 hrs in front of Hotel International Inn, Mahipalpur, New Delhi, when 1.900 Kgs of Methamphetamine was being carried in that taxi in a black coloured bag with the marking 'DELL' by the co-accused Eric Jayden in pursuance of the criminal conspiracy between Eric Jayden, Ebera Nwanaforo (the applicant), co-accused Frank Vitus and Christian Chukwuma and further with a further recovery of 1.450 Kgs of Methamphetamine having been recovered from premises H-4/74A, Flat No.402, Bengali Colony, Mahavir Enclave, New Delhi-45 from a yellow coloured cloth bag kept in that room along with the hall of the said house which 1.450 kgs as per the status report the NCB which was recovered from the bag was seized from Christian Chukwuma.



25. The NCB has further submitted that the applicants are foreign nationals and under trials in illegal pursuit of trafficking of contraband drugs with a seizure of 1.900 Kgs of Methamphetamine from the accused Eric Jayden which is a large quantity of a drug who was with the applicants taken in the same taxi apart from a recovery of 1.450 Kgs of Methamphetamine from the co-accused Christian Chukwuma, i.e., accused no.4 from the search of his premises from which house Kailash Yadav, the taxi driver of taxi bearing No. HR 66A 4681 had stated that he had brought the accused Eric Jayden (since absconding) Ebera Nwanaforo (applicant of Bail Appln. No. 3705/2020) and Frank Vitus (applicant of Bail Appln. No. 4187/2020) and that the said taxi driver had led the NCB team to the said house and it was thus contended by the NCB that the applicants have thus committed a serious offence and that material witnesses remained to be examined and the trial is in progress and the release of the applicants on bail shall adversely affect the trial and that the applicants have no roots in society and are likely to jump bail.

26. Inter alia, the NCB submitted that the co-accused Eric Jayden, who is a foreign national, who was released on interim bail for treatment has been absconding and this aspect had been taken into account by this Court whilst dismissing the bail application of the applicant accused Frank Vitus (applicant of Bail Appln. No. 4187/2020) vide order dated 13.2.2020 in Bail Appln. No.1161/2019 and that the said aspect was also taken into account at the stage of dismissal of Bail Appln. No. 496/2019 of the other co-accused Christian Chukwuma vide order dated 30.1.2020.



27. On behalf of the NCB reliance was placed on the verdict of the Hon'ble Supreme Court in ***Union of India through Narcotics Control Bureau, Lucknow V. Md. Nawaz Khan***; a verdict dated 22.9.2021 in CrI.Appeal No. 1043/2021 to submit to the effect that the applicants who were travelling in the same car as the co-accused Eric Jayden would have to essentially be held to be in conscious possession of the contraband comprising of 1.900Kgs of Methamphetamine and thus were not entitled to be released on bail in view of the embargo in terms of Section 37 of the NDPS Act, 1985. The observations in paragraph 12 of the verdict in ***Union of India through Narcotics Control Bureau, Lucknow V. Md. Nawaz Khan***(supra) read to the effect:

*“12 At the present stage, it is material to note that:
(i) The vehicle which was intercepted at Lucknow was proceeding from Dimapur (Nagaland) towards Rampur (Uttar Pradesh);
(ii) The quantity of 3.300 kg of a narcotic substance which is a commercial quantity was found concealed in the vehicle;
(iii) The respondent is not an unknown passenger but a person who, according to the prosecution, was closely in contact with the co-accused.”*

Inter alia, the NCB has placed reliance on the aspect of CDRs of mobile phones of the applicants to contend to the effect that there was a conspiracy between the applicants with the co-accused Eric Jayden.

28. On behalf of the applicants, a catena of verdicts was relied upon with the thrust of submissions on behalf of the applicants both on the aspect of inadmissibility of statements under section 67 of the NDPS



Act, 1985, allegedly made by the applicants to the officers of the NCB in view of the verdict of the Hon'ble Supreme Court in ***Tofan Singh V. State of Tamil Nadu***: (2021) 4 SCC 1 a verdict dated 29.10.2020 submitting to the effect that the reliance that the NCB has placed on the orders of this Court in Bail Appln. No. 1161/2019 of the applicant Frank Vitus (applicant of Bail Appln. No. No. 4187/2020) dated 13.2.2020 in this very case whereby the application of the applicant, i.e., Frank Vitus, seeking grant of bail had been rejected and the reliance placed on behalf of the NCB on the order dated 30.1.2020 of this Court in Bail Appln. No. 496/2019 of the co-accused Christian Chukwuma, is wholly misplaced with it having been submitted that the said orders were prior to the verdict of the Hon'ble Supreme Court in ***Tofan Singh V. State of Tamil Nadu*** (supra) decided on 29.10.2020 and that whether the applicants qualify the conditions under Section 37 of the NDPS Act, 1985, has now to be viewed in the light of the said verdict.

29. Inter alia, the applicants have placed reliance on the testimony of the alleged Taxi Driver Kailash Yadav examined as PW-14, i.e, on his testimony recorded on 18.10.2021, 17.11.2021, 27.11.2021 to submit to the effect that even in the testimony of the public witness, the taxi driver, examined by the NCB there is nothing incriminating against the applicants qua the alleged possession of 1.900 Kgs. of Methamphetamine wherein he stated in his examination-in-chief to the effect:

“.....So far as I remember 20/22 of the 3rd month of 2014 my car was again booked by



Eric and I visited with them to Palam Enclave, wherefrom his two associates also joined him and sitted in my taxi and thereafter at their instruction I reached Hotel International inn Mahipalpur, New Delhi. After 10 mins waiting I asked to start the car but meanwhile the door of the car was opened by some NGB officers to which the said Eric and his associates tried to runaway but they were hold by the NCB officers. Thereafter we taken to NCB office. Again said the personal search of the said Eric and his associates was taken by the NCB officers at the spot. One black colour bag was recovered from Eric and same was found concealed white colour powder substance which came to be 1.900/kg at the spot. Thereafter, the Eric and his associates were taken to the NCB office and their personal seach was taken but nothing incriminating was recovered.....

XXXX by SPP for NCB

“.....It is correct that on 21.05.2014,accused Eric Jayden was picked up in my taxi near from hotel International Inn and taken to Palam Vihar, Bengali colon, Mahavir Enclave, I waited there for some time outside the house where accused Eric Jayden was inside and after some time accused Eric came back with polythene, besides him, two more black complexion persons came out with Eric with a black colour bag and they seated in my taxi and asked me to go to Palam, Mahipalpur. Accordingly, we reached Mahipalpur and after that they were



intercepted by NCB officers and contraband was recovered from the black colour bag. It is also correct that I was remained present at the time of recovery of contraband from the black colour laptop bag.....”

and the cross-examination conducted of this witness PW-14 on behalf of the two applicants Ebera Nwanaforo (applicant of Bail Appln. No. 3705/2020) and Frank Vitus (applicant of Bail Appln. No. 4187/2020) reads to the effect:

“The taxi was owned by me. The booking was done through travel house. I have not taken the accused Eric Jayden prior to the present incident. I had not seen him prior to present incident. I was not aware about the exact residential address of the accused Eric Jayden. The accused Eric Jayden was firstly picked up and he was having black colour bag. The rest two accused persons besides the Eric Jayden were taken on the instructions of accused Eric Jayden. Before taking them, accused Eric Jayden went to the hotel of International Inn. I do not remember as to what time accused Eric was remained inside the hotel. I cannot tell as to whom Eric Jayden went to meet inside the hotel. After leaving the hotel, I along with accused Eric Jayden went to Bengali colony, Mahavir Enclave, however I do not know the number of the house in which Eric Jayden went there. After completion of recovery proceedings, accused persons were taken by NCB officers with them after giving notice to them.”,



to contend to the effect that as per the testimony of Kailash Yadav, the taxi driver itself, the allegations levelled against the applicants are wholly circumspect and that furthermore as per the testimony of this witness, the co-accused Eric Jayden had been first picked up with the black coloured bag and the other two accused persons were taken on the instructions of Eric Jayden and before taking the present applicants, the co-accused Eric Jayden had gone to the Hotel International Inn, though the taxi driver could not remember till what time Eric Jayden remained inside the hotel and whom he had gone to meet and after leaving the hotel, and had stated that he along with Eric Jayden went to Bengal Colony, Mahavir Enclave.

30. The applicants thus submitted that even in relation to the allegations of they having been conspirators with the co-accused Eric Jayden, the testimony of the public witness does not bring forth the applicants to be the conspirators with the said Eric Jayden in as much as, as per the testimony of the taxi driver Sh.Kailash Yadav, the said Eric Jayden had come alone initially with the black coloured DELL bag containing 1.900 Kgs of Methamphetamine and the applicants were allegedly taken into the taxi at his behest and were taken into the taxi after Eric Jayden had already gone to the Hotel International Inn and that it cannot be contended as sought to be contended by the NCB that the applicants boarded the taxi together from near the Hotel International Inn with Eric Jayden who had the black coloured DELL bag with him.

31. On behalf of the applicants it was contended that they having been incarcerated since 21.5.2014 and more than a period of 8 years



having elapsed therefrom, in terms of the verdict of the Hon'ble Supreme Court in ***Supreme Court Legal Aid Committee Representing Undertrial Prisoners V. Union of India & Ors.***; (1994) 6 SCC 731, a verdict dated 7.10.1994, the applicants in terms of the directions in paragraph 15 (iii) thereof were entitled to be released on bail subject to the terms and conditions as stipulated in the said verdict.

32. Reliance was also placed on behalf of the applicants on the verdict in ***Thana Singh V. Central Bureau of Narcotics***; (2013) 2 SCC 603 wherein the observations of the Hon'ble Supreme Court in the NDPS cases at the stage of consideration of the question of grant of bail to an accused facing trial under the NDPS Act in ***Supreme Court Legal Aid Committee Representing Undertrial Prisoners V. Union of India & Ors.*** (supra) were referred to and in terms thereof it was observed in relation to a case under Section 8 read with Section 29 of the NDPS Act, 1985, where the accused was languishing in Jail for a period of 12 years as under:

"2. Vide order dated 16-8-2010, we had directed the Assistant Commissioner (Narcotics), Neemuch to file an affidavit explaining the cause for undue delay in the trial. Simultaneously, we had also requested the Special Judge, NDPS, Mandsaur (M.P.) to send a report regarding the present status of the trial. In response thereto, the Deputy Narcotics Commissioner, Neemuch (M.P.) has filed an affidavit wherein it is stated that there is no delay on the part of the said Bureau and "it appears from the record that the delay has been occasioned either due to the appellant or the other co-accused persons". As



regards the present stage of trial, it is pointed out that witnesses have already been examined by the prosecution and there is every possibility of the trial being concluded within a short period.

3. We have heard the learned counsel for the appellant as also the learned Additional Solicitor General for the Narcotics Bureau.

4. Time and again, this Court has emphasised the need for speedy trial, particularly when the release of an undertrial on bail is restricted under the NDPS Act. While considering the question of grant of bail to an accused facing trial under the NDPS Act in Supreme Court Legal Aid Committee v. Union of India this Court had observed that though some amount of deprivation of personal liberty cannot be avoided in such cases, but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 of the Constitution would receive a jolt. It was further observed that after the accused person has suffered imprisonment, which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21. We regret to note that despite it all, there has not been visible improvement on this front.

5. Bearing in mind these observations and having regard to the fact that in the present case the appellant has been in custody for more than 12 years and seemingly there being no prospect of the conclusion of trial in the near future, we are of the opinion that it is a fit case where he deserves to be admitted to bail forthwith.



6. Accordingly, the appeal is allowed; the impugned order is set aside and it is directed that the appellant shall be granted bail till the conclusion of the trial, subject to the following conditions:

(i) the appellant shall furnish personal bond in the sum of Rs 20,000 with one surety in the like amount to the satisfaction of the trial court,

(ii) the appellant shall report to the trial court on every 1st and 14th of the calendar month at 10.00 a.m.;

(iii) the appellant shall not leave the jurisdictional area of the trial court without the permission of the court;

(iv) if any of these conditions are violated, or a case for cancellation of bail is made out, the trial court will be at liberty to cancel the bail.

7. We would also direct the trial court to expedite the trial and try to conclude it within one year from the date of receipt of a copy of this order.”

33. Reliance was also placed on behalf of the applicants on the verdict of the Hon’ble Supreme Court in **Union of India. V. K.A. Najeeb**; (2021) 3 SCC 713 a verdict dated 1.2.2021 wherein in a case qua the alleged commission of offences punishable under Sections 143/147/148/120-B/341/427/323/324/326/506 II /201/202/153-A/ 212/ 307/149 of the Indian Penal Code, 1860 read with Section 3 of the Explosive Substances Act, 1908 and Sections 16,18,18-B/19 and 20 of the Unlawful Activities (Prevention) Act, 1967, (UAPA) in an appeal against an order dated 23.7.2019 of the Hon’ble High Court of Kerala at Arnakulam, where bail was granted to the respondent, it was observed by the Hon’ble Supreme Court as under:



“This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial the courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge them on bail.”

with observations in paragraphs 18 and 19 to the effect:

“18. Adverting to the case at hand, we are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail. An attempt has been made to strike a balance between the appellant's right to lead evidence of its choice and establish the charges beyond any doubt and simultaneously the



respondent's rights guaranteed under Part III of our Constitution have been well protected.

19. Yet another reason which persuades us to enlarge the respondent on bail is that Section 43-D(5) of the UAPA is comparatively less stringent than Section 37 of the NDPS Act. Unlike the NDPS Act where the competent court needs to be satisfied that prima facie the accused is not guilty and that he is unlikely to commit another offence while on bail; there is no such precondition under UAPA. Instead, Section 43-D(5) of the UAPA merely provides another possible ground for the competent court to refuse bail, in addition to the well-settled considerations like gravity of the offence, possibility of tampering with evidence, influencing the witnesses or chance of the accused evading the trial by absconson, etc.”

34. Reliance was also placed on behalf of the applicants on the verdict of the Hon'ble Supreme Court in ***Tapan Das V. Union of India***; Petition for Special Leave to Appeal (Crl.) 5617/2021 wherein it was observed to the effect:

“ Taking into consideration the fact that the petitioner is reported to be in custody since 6.10.2017 and has, thus, suffered incarceration for around 4 years and there is no likelihood of completion of trial in the near future, which facts are not converted by learned Additional Solicitor General Union of India during the course of hearing, we are inclined to grant bail to him.

The petitioner is, therefore, directed to be released on bail, subject to such terms & conditions which the concerned Trial Court shall deem fit and appropriate to impose upon him.”



35. Reliance was also placed on behalf of the applicants on the verdict of the Hon'ble Supreme Court in Petition for Special Leave to Appeal (Crl.) 13/22 in **Baba Fakruddin Sheikh @ Fakru v. State** a verdict dated 16.2.2022 against order dated 25.3.2021 of this Court in Bail Appln. No. 334/2021, in which the prayer made for bail by the accused Baba Fakruddin Sheikh @ Fakru in relation to alleged commission of offences punishable under Sections 21 & 29 of the NDPS Act, 1985 was rejected on the grounds of recovery of 200 gms of heroine from the accused with the CDR mobile phone of that accused indicating his connection with the master mind of the International Drug Cartel with the total recovery in the case from all accused persons being 36.240 Kgs it having been held that the bar under Section 37 of the NDPS Act, 1985, was applicable, vide order dated 16.2.2022 the Hon'ble Supreme Court in that case observed to the effect:

“ Taking into consideration the fact that the petitioner has suffered incarceration for a period of 7 years and 6 months and more particularly the fact there is no possibility of the trial concluding in the near future, we deem it to be a fit case to grant him bail.

The petitioner is, accordingly, directed to be enlarged on bail on terms and conditions to be imposed by the trial court.”

36. Inter alia, the applicants have placed reliance on the verdict of the Co-ordinate Bench of this Court in **Atul Aggarwal V. Directorate of Revenue Intelligence** (2021) SCC OnLine Del 5489 in which case the applicant thereof sought grant of bail in relation to SC No. 7369/16



(Old SC No. 47A/12 of 2012) registered by the DRI qua the alleged commission of offences punishable under Sections 9A,21,23,25A of the Narcotics Drugs and Psychotropic Substances Act, 1985, with allegations therein of recovery of 151.980 Kgs. of Ketamine recovered from 8 corrugated boxes at the Air Cargo Complex, New Delhi, scheduled to be exported in the name of M/s Sagar Impex in which case consequent to the recovery, a search was conducted at the premises of the alleged syndicate on 19.7.2012 and statements of Paramjit Singh Gulati and the applicant of Bail Appln. No 2477/2021 Atul Aggarwal were recorded on 19.7.2012 and 20.7.2012 under Section 67 of the NDPS Act, 1985 with allegations made by Paramjit Singh Gulati whose statement under Section 67 of the NDPS Act, 1985 allegedly incriminated the applicant Atul Aggarwal whose statement was also thereafter recorded under Section 67 of the NDPS Act, 1985, wherein he allegedly confessed to his having joined Paramjit Singh Gulati in exporting narcotic substances. A statement of one Raju Gupta an Executive of M/s DelEx Cargo India Pvt. Ltd. is indicated to have been recorded under Section 67 of the NDPS Act, 1985, wherein he stated that the petitioner Atul Aggarwal had approached that company for clearance of one export consignment of M/s Shiv Jyoti Sales Corp. declared to be handicraft item with it having inter alia been alleged that the contraband was being packed in packing material concealed in various handicraft items, ladies purses, Henna Powder, imitation jewellery etc. The submissions in the said case were to the effect that the applicant therein Atul Aggarwal had been in custody since 20.07.2012 and reliance was placed on the



judgment of the Hon'ble Supreme Court in *Supreme Court Legal Aid Committee Representing Undertrial Prisoners V. Union of India & Ors.* (supra) with it also having been submitted that apart from the disclosure statement of the applicants and the co-accused, there was no material against the applicant thereof which disclosure statements had no evidentiary value in terms of the verdict in *Tofan Singh V. State of Tamil Nadu* ; (2021) 4 SCC 1 with it having been submitted that the embargo under Section 37 of the NDPS Act, 1985 did not apply.

37. The other contention raised on behalf of the applicant therein was whilst placing reliance on the verdict of the Hon'ble Supreme Court in *Union of India. V. K.A. Najeeb* (supra) to contend to the effect that it had been held therein by the Hon'ble Supreme Court that the statutory restrictions like the one imposed under Section 43D (5) of the Unlawful Activities (Prevention) Act 1967, did not necessarily mean that the very availability of Constitutional Courts to grant bail would be ousted as the same would entail a violation of Article 21 of the Constitution of India.

38. The DRI in that case contended that 151.980 Kgs. of ketamine hydrochloride, a commercial quantity had been recovered and thus where the charges had already been framed with the order of framing of charges having attained finality, the bar of Section 37 of the NDPS Act, 1985, applies. Inter alia, the DRI contended that the co-accused Paramjit Singh Gulati had been declined bail in this very case.

39. The further contention raised on behalf of the DRI was to the effect that apart from 151.190 kgs of Ketamine that had been



recovered in the instant case, the admissions of the applicant and the co-accused had resulted into the seizure of one more consignment of 300 Kgs of Ketamine dissolved in Rose Water at the godown premises. The DRI further submitted that the contention of the applicant that the trial was taking an unduly long time was false and assured the Court that the trial would be concluded expeditiously and vehemently opposed the prayer made by the applicant therein for grant of bail.

40. The Co-ordinate Bench in **Atul Aggarwal** (supra) after taking into account the provisions of section 37 of the NDPS Act, 1985, which read to the effect

“37. Offences to be cognizable and non-bailable.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for 2[offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974)



or any other law for the time being in force, on granting of bail.]”

and after observing to the effect that the grant or refusal of bail in a case involving commercial quantity of contraband substances under the NDPS Act, 1985 is governed by Section 37 thereof and after reference to the verdict of the Hon’ble Supreme Court in ***Collector of Customs V. Ahmadalieva Nodira***; (2004) 3 SCC 549 to the effect:

“6. As observed by this Court in Union of India v. Thamisharasi [(1995) 4 SCC 190 : 1995 SCC (Cri) 665 : JT (1995) 4 SC 253] clause (b) of sub-section (1) of Section 37 imposes limitations on granting of bail in addition to those provided under the Code. The two limitations are: (1) an opportunity to the Public Prosecutor to oppose the bail application, and (2) satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail.

7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused respondent is concerned, are: the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression “reasonable grounds” means something more



than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence....."

and on the verdict of the Hon'ble Supreme Court in ***Union of India V.***

Rattan Mallik : (2009) 2 SCC 624 with observations to the effect that:

"12. It is plain from a bare reading of the non obstante clause in Section 37 of the NDPS Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz. (i) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds".

13. The expression "reasonable grounds" has not been defined in the said Act but means something more than prima facie grounds. It



connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn, points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence (vide Union of India v. Shiv Shanker Kesari [(2007) 7 SCC 798 : (2007) 3 SCC (Cri) 505]). Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the court is not called upon to record a finding of “not guilty”. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.”

(emphasis supplied)

and observations in Atul Aggarwal (supra) to the effect that

“11. In the instant case, the quantity of contraband recovered is 151.980 kgs of ketamine, which is a commercial quantity. In Gurdev Singh v. State of Punjab, (2021) 6 SCC 558, the Supreme Court had discussed the deleterious impact of narcotic



drugs on society, and how the menace of drug addiction did not only have the ability of destroying the life of just one individual, but how it could destroy the lives of generations to come. Therefore, the consequences of dealing of drugs and drug abuse can be experienced across the board, from causing economic issues to societal disintegration. The purpose of enacting the NDPS Act was to curb this menace, and this purpose must be borne in mind while considering the grant of bail pertaining to the NDPS Act.

12. However, it is also pertinent to note that the Petitioner herein was arrested on 20.07.2012. It has been nine years since he has been in custody. While remaining conscious of the fact that the gambit of drug trafficking must be deterred with stringent punishments, and that those who indulge in such nefarious activities do not deserve any sympathy, Courts must also not ignore the plight of the undertrials who remain languishing in jails as their trials are delayed with no end in sight. Deprivation of personal liberty without the assurance of speedy trial contravenes the principles enshrined in our Constitution under Article 21, and is, therefore, unconstitutional to its very core. In such cases, in absence of the pronouncement of conviction, the process itself becomes the punishment. Nine years cannot be said to be a short period of time.

13. The Supreme Court, while deciding a petition pertaining to the delay in disposal of cases under the NDPS Act, had issued certain directions, subject to general conditions, in Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India (supra) which have been reproduced as follows:

“(i)Where the undertrial is accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an undertrial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged



with more than one offence, the offence providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail shall be to the satisfaction of the Special Judge concerned with two sureties for like amount.

(ii) Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount shall in no case be less than Rs 50,000 with two sureties for like amount.

(iii) Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.

(iv) Where an undertrial accused is charged for the commission of an offence punishable under Sections 31 and 31A of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order.”

(emphasis supplied)

and thus applying the directions i.e. direction (iii) of the verdict of the Hon'ble Supreme Court in ***Supreme Court Legal Aid Committee Representing Undertrial Prisoners V. Union of India & Ors.*** (supra) held to the effect:



“14. As per Direction (iii) in the aforementioned judgement, where an undertrial accused has been charged with offence(s) under the NDPS Act which is punishable with minimum imprisonment of ten years and a minimum fine of rupees one lakh, then such an undertrial is to be released if he has been in jail for not less than five years. In the instant case, the Petitioner has been charged with offences punishable under Sections 9A, 21, 23, 25A of the NDPS Act. With minimum imprisonment of 10 years as stipulated under these offences, an undertrial is to be released if he has been in jail for not less than five years. However, in the case herein, the Petitioner has been in custody for more than 9 years. Therefore, the petitioner is squarely covered by the aforementioned judgment.

15. Applying the law that has been laid down by the Supreme Court in Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India (supra) and flowing from Section 37 of the NDPS Act, this Court is of the opinion that the instant case is fit for grant of bail. This Court is, therefore, inclined to grant bail to the Petitioner herein, subject to the following conditions:

- a) The petitioner shall furnish a personal bond in the sum of Rs.1,00,000/- with two sureties of the like amount, one of them should be the relative of the petitioner, to the satisfaction of the Trial Court;*
- b) The petitioner is directed to deposit his passport with the Trial Court.*
- c) The Memo of Parties shows that the petitioner is residing at R/O*



178, West Guru Anand Nagar, New Delhi- 110092. The petitioner is directed to reside at the same address. In case of any change of address, the petitioner is directed to inform the same to the Investigating Officer;

d) The petitioner shall report to the concerned Police Station twice in a week, that is, on every Wednesday and Friday at 10:30 AM, and the police is directed to release him by 11:00 AM after recording his presence and completion of all the necessary formalities;

e) The petitioner shall not leave NCT of Delhi without the prior permission of the trial Court;

f) The petitioner is directed to give all his mobile numbers to the Investigating Officer and keep them operational at all times;

g) The petitioner shall not, directly or indirectly, tamper with evidence or try to influence the witnesses in any manner;

h) In case it is established that the petitioner has indulged in similar kind of offences or tried to tamper with the evidence, the bail granted to the petitioner shall stand cancelled forthwith.

16. Be it noted that the observations made in this order are only for grant of bail and not on the merits of the case.”



It is essential to observe that the DRI has not challenged the verdict of the Co-ordinate Bench of this Court in ***Atul Aggarwal V. DRI*** (Supra). In the verdict of the Co-ordinate Bench of this Court in **Anil Kumar @ Nillu V. State**; Bail Appln. No. 1724/2021, a verdict dated 21.3.2022 in a case under Sections 468/471/201 of the Indian Penal Code, 1860, and Sections 20/29 of the NDPS Act, 1985, with allegations qua alleged recovery of 2.210 Kgs of Charas/Hasish on 26.3.2014 wherein the applicant submitted qua the ground of his being the bread earner of his family and being in judicial custody for 7 years and 10 months with reliance having been placed on the verdict of the Hon'ble Supreme Court in ***Supreme Court Legal Aid Committee Representing Undertrial Prisoners V. Union of India & Ors***; (supra) reference was made to the verdict of the Hon'ble Division Bench of the High Court of Calcutta ***In Re; Sanawar Ali*** a verdict dated 27.11.2020 reported in (2021) CrLJ 403.

41. It is essential to observe that the question raised in ***Re; Sanawar Ali*** (supra) was to the effect:

“ 1. An interesting question is raised in this bail application:- Whether restrictions imposed by Section 37 of the NDPS Act are over ridden by the operation of the directions given by the Hon'ble Apex Court in Supreme Court Legal Aid Committee vs. Union of India MANU/SC/0877/1994: (1994) 6 SCC 731 in the matter of grant of bail to undertrials in NDPS cases.”



in which case the applicant therein had been in custody for 5 years and 6 months, with it having been observed in paragraph 13 in **Anil Kumar V. State** to the effect:

“13. It is unconscionable to state that the rights guaranteed under Article 21 can be subjected to such arbitrary categorisation and would not apply across the board to all undertrials in NDPS cases who are at the receiving end of inordinate delay in trial. In Re: Sanawar Ali (supra), the Calcutta High Court had comprehensively considered the issue as to whether the directives in Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) (supra) were only intended to operate as a “one-time measure” and had observed that the directives had been subsequently extended to other states vide Order dated 17.04.1995 in (1995) 4 SCC 695. The relevant portion of the Calcutta High Court judgement is as follows:

"10. It is argued that such directions were intended to operate as an 'one time measure' in the State of Maharashtra. We, however, note that the directives were subsequently extended to the State of West Bengal and other States vide order dated 17th April, 1995 reported in 1995 (4) SCC 695. We are of the view that the aforesaid directives of the Apex Court in the matter of grant of bail due to inordinate delay are required to be taken into consideration and similar relief is to be extended to all undertrials who stand on the same footing. Liberty is an inalienable right of every individual guaranteed by our Constitution and cannot be whittled down by arbitrary categorisation. 'Procedure established by law' under Article 21 cannot be viewed in isolation from the principles of 'equal justice' or 'equality before law' enshrined under Article 14. To achieve such universal equality it is imperative that the



directives laid down by the Court in the said report be extended to all undertrials who are similarly circumstanced and are suffering protracted detention throughout the length and breadth of the country. Selective approach to personal liberty is an anathema to our constitutional scheme. Hence, it is the duty of every Court including the High Courts when faced with the question of "bail or jail" to bear in mind the beholden principles of parity and equal access to justice. Courts need to rise above petty technicalities to preserve and restore liberty to all similarly circumstanced persons. Failure to do so, would create privileged oases of liberty accessible to few and denial of freedom to most."

42. It was also observed by this Court in **Anil Kumar** (Supra) in paragraphs 9, 10, 11,12, 14,15 and 16 to the effect:

9. At the outset, it would be pertinent to refer to Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India (supra). The petition therein had been instituted with the aim to ensure that undertrial prisoners who had been languishing in jail for an extended period of time were granted bail despite the stringency of the provisions for bail under the NDPS Act. The underlying reason for the same was to uphold the right to personal liberty and the right to speedy trial of an undertrial under Article 21 of the Constitution of India.

10. Accordingly, in the aforementioned judgement, the Supreme Court passed certain directions, subject to general conditions, wherein it categorically noted that where an undertrial accused has been charged with offence(s) under the NDPS Act which is punishable with minimum imprisonment of ten years and a minimum fine of rupees one lakh, then such an undertrial is to



be released if he has been in jail for not less than five years. The entirety of the directions have been reproduced as under:

“(i) Where the undertrial is accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an undertrial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged with more than one offence, the offence providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail shall be to the satisfaction of the concerned Special Judge with two sureties for like amount.

(ii) Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount shall in no case be less than Rs. 50,000 with two sureties for like amount. (iii) Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.”

(emphasis supplied)



11. It is the contention of the learned Counsel for the Petitioner that as the Petitioner herein has been accused of offences punishable under Sections 20/29 of the NDPS Act and has been in custody for almost eight years till date, he is squarely covered by the aforementioned judgement and is entitled to be released. This has been opposed by the learned APP who relies upon paragraph 16 of the judgement to state that the directions were intended to operate as a one-time measure for the case therein and were not intended to apply to all subsequent cases of a like nature. For ease of comprehension, the said paragraph is as under:

"16. We may state that the above are intended to operate as one-time directions for cases in which the accused persons are in jail and their trials are delayed. They are not intended to interfere with the Special Court's power to grant bail under Section 37 of the Act. The Special Court will be free to exercise that power keeping in view the complaint of inordinate delay in the disposal of the pending cases. The Special Court will, notwithstanding the directions, be free to cancel bail if the accused is found to be misusing it and grounds for cancellation of bail exist. Lastly, we grant liberty to apply in case of any difficulty in the implementation of this order."

(emphasis supplied)

12. A bare perusal of paragraph 16 indicates to this Court that the directions were not meant to be employed as one-time directions in the said case, but were meant to apply as a one-time measure in all cases in which the accused persons were in jail and their trials had been delayed. The intention of paragraph 16 was to convey that despite the absence or presence of delay in trial in a case, the Special Court was still free to exercise its power to grant bail under Section 37 of the NDPS Act. Furthermore, if the Special Court also retained the power to cancel bail if the accused was found to be misusing the same. The directions were certainly not, as the learned APP has submitted, meant to only apply in the case therein,



but were directions that were to be followed by Courts in all cases pertaining to NDPS wherein the accused had been subjected to prolonged delay in their trials.

(emphasis supplied)

13

14. In view of the above, this Court believes that achievement of universal equality before the law requires the tenets of personal liberty to be applicable to all similarly circumstanced individuals and must not be restricted unless according to procedure established by law. This Court does not find any weight in the submission of the learned APP that the aforementioned judgment of the Supreme Court does not apply to the instant case and that the judgement of this Court in *Atul Agarwal v. Directorate of Revenue Intelligence (supra)* must be referred to a larger Bench due to the incorrect application of the Supreme Court's judgement. Furthermore, in *Atul Agarwal v. Directorate of Revenue Intelligence (supra)*, this Court had not solely granted bail on the footing of the inordinate delay in trial, but had also considered the twin requirements stipulated under Section 37 of the NDPS Act. Therefore, this Court is of the opinion that the Petitioner herein is squarely covered by judgement of the Supreme Court and is entitled to release on account of inordinate delay in trial and prolonged judicial custody.

15. This Court also finds it necessary to state that the right to speedy trial is an intrinsic part of Article 21 of the Constitution of India. The Supreme Court has time and again delineated its importance as a constitutional right in various judgements, starting from *Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar*, (1980) 1 SCC 81, to *A.R. Antulay and Ors. v. R.S. Nayak and Anr.*, (1992) 1 SCC 225. In the latter judgement, the Supreme Court had laid down guidelines with regard to the right to speedy trial of an accused and had observed as follows:

"81. Article 21 declares that no person shall be deprived of his life or liberty except in accordance with the procedure prescribed by law. The main procedural law in this country is the Code of Criminal Procedure, 1973. Several other



enactments too contain many a procedural provision. After Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : AIR 1978 SC 597] , it can hardly be disputed that the 'law' [which has to be understood in the sense the expression has been defined in clause (3)(a) of Article 13 of the Constitution] in Article 21 has to answer the test of reasonableness and fairness inherent in Articles 19 and 14. In other words, such law should provide a procedure which is fair, reasonable and just. Then alone, would it be in consonance with the command of Article 21. Indeed, wherever necessary, such fairness must be read into such law. Now, can it be said that a law which does not provide for a reasonably prompt investigation, trial and conclusion of a criminal case is fair, just and reasonable? It is both in the interest of the accused as well as the society that a criminal case is concluded soon. If the accused is guilty, he ought to be declared so. Social interest lies in punishing the guilty and exoneration of the innocent but this determination (of guilt or innocence) must be arrived at with reasonable despatch — reasonable in all the circumstances of the case. Since it is the accused who is charged with the offence and is also the person whose life and/or liberty is at peril, it is but fair to say that he has a right to be tried speedily. Correspondingly, it is the obligation of the State to respect and ensure this right. It needs no emphasis to say, the very fact of being accused of a crime is cause for concern. It affects the reputation and the standing of the person among his colleagues and in the society. It is a cause for worry and expense. It is more so, if he is arrested. If it is a serious offence, the man may stand to lose his life, liberty, career and all that he cherishes."

(emphasis supplied)



16. Therefore, fair, just and reasonable procedure is implicit in Article 21 and it creates a right in the accused to be tried speedily. This Court has consistently observed that while Courts must remain cognizant of the deleterious impact of drugs on society, it is also important to keep in mind that deprivation of personal liberty without the assurance of speedy trial contravenes the principles enshrined in our Constitution. In the instant case, the Petitioner has been incarcerated for almost eight years now, i.e. since 27.03.2014, for an offence that is punishable with a minimum imprisonment of ten years. This is an egregious violation of an accused's right to personal liberty and right to speedy trial as, in the off-chance that the Petitioner is acquitted, it would entail an irretrievable loss of eight years of his life that cannot be compensated. Whether or not the Petitioner played an active role in the commission of the offence of drug trafficking and supply is a matter of trial and cannot justify the prolonged incarceration of the Petitioner."

43. The applicant thereof was allowed to be released on bail subject to terms and conditions as imposed thereby in terms of the verdict of the Hon'ble Supreme Court in ***Supreme Court Legal Aid Committee Representing Undertrial Prisoners V. Union of India & Ors;*** and drawing from Section 37 of the NDPS Act, 1985 whilst observing to the effect:

16. Therefore, fair, just and reasonable procedure is implicit in Article 21 and it creates a right in the accused to be tried speedily. This Court has consistently observed that while Courts must remain cognizant of the deleterious impact of drugs on society, it is also important to keep in mind that deprivation of personal liberty without the assurance of speedy trial contravenes the principles enshrined in our Constitution. In the instant case, the Petitioner has been



incarcerated for almost eight years now, i.e. since 27.03.2014, for an offence that is punishable with a minimum imprisonment of ten years. This is an egregious violation of an accused's right to personal liberty and right to speedy trial as, in the off-chance that the Petitioner is acquitted, it would entail an irretrievable loss of eight years of his life that cannot be compensated. Whether or not the Petitioner played an active role in the commission of the offence of drug trafficking and supply is a matter of trial and cannot justify the prolonged incarceration of the Petitioner."

the applicant thereof was entitled to the grant of bail.

44. Inter alia, the applicants have placed reliance on the verdict of the Hon'ble High Court of Himachal Pradesh in ***Tarun Kumar V. State of Himachal Pradesh***, a verdict dated **4.1.2022**, in which case there were allegations in relation to the alleged commission of offences punishable under Sections 20/29 of the NDPS Act, 1985 with alleged recovery of 4.02 Kgs of charas, the applicant thereof was allowed to be released on bail.

45. Inter alia, the applicants have placed reliance on the verdict of this Court in ***Lambert Kroger V. Enforcement Directorate***; 2000 (53) DRJ 288 to contend to the effect that bail cannot be denied to the applicant merely because he is a foreign national.

46. Reliance was also placed on behalf of the applicants on the verdict of the Hon'ble Supreme Court in ***State By (NCB) Bengaluru V. Pallulabid Ahmad Arimutta & Anr.***; Petition for Special Leave to Appeal (Crl.) 242/2022, a verdict dated 10.1.2022 to contend to the



effect that in terms of this verdict in *Tofan Singh V. State of Tamil Nadu* (supra) as it has been reiterated by the Hon'ble Supreme Court that the confessional statement recorded under Section 67 of the NDPS Act, 1985 remains inadmissible in the trial of the offence under the of the NDPS Act, 1985, there was no incriminating evidence collected by the NCB against the applicants herein.

ANALYSIS

47. On a consideration of the submissions made on behalf of either side and the catena of verdicts relied upon on behalf of either side, this Court is of the considered view that in view of the verdict of the Hon'ble Supreme Court in *“Supreme Court Legal Aid Committee Representing Undertrial Prisoners V Union of India & Ors.”* (1994) **6 SCC 731** and the verdict of the Co-ordinate Bench of this Court in *“Atul Aggarwal Vs. Directorate of Revenue Intelligence”* in Bail Appln. 2477/2021, a verdict dated **21.12.2021** and in *“Anil Kumar @ Nillu Vs. State”* in Bail Appln. 1724/2021, a verdict dated **21.03.2022** and the verdict of the Hon'ble Division Bench of the Hon'ble High Court of Calcutta in *“In Re: Sanawar Ali”* **2021 Crl LJ 403** a verdict dated 27.11.2020 (none of which verdicts have been challenged by the DRI, the State or the NCB) as referred to in *Anil Kumar @ Nillu* (supra) by this Court, the parameters laid down by the Hon'ble Supreme Court in *Supreme Court Legal Aid Committee Representing Undertrial Prisoners* (supra) have essentially to be followed and cannot be curtailed qua the directions laid down therein in paragraph 15(iii) of the said verdict which prescribes therein in



relation to offences punishable under the NDPS Act, 1985 qua offences where the undertrial accused are charged with offences under the NDPS Act, 1985 *punishable with minimum imprisonment of 10 years and a minimum fine of Rupees one lakh to be entitled to be released on bail if they have been in jail for not less than five years provided they furnish bail in the sum of Rupees one lakh with two sureties of the like amount with further general conditions as detailed in the verdict of the Hon'ble Supreme Court as in paragraph 15 (i) to (viii).*

48. The observations in paragraph 15 of the said verdict read to the effect:-

“15. But the main reason which motivated the Supreme Court Legal Aid Society to file this petition under Article 32 of the Constitution was the delay in the disposal of cases under the Act involving foreigners. The reliefs claimed included a direction to treat further detention of foreigners, who were languishing in jails as undertrials under the Act for a period exceeding two years, as void or in any case they be released on bail and it was further submitted by counsel that their cases be given priority over others. When the petition came up for admission it was pointed out to counsel that such an invidious distinction between similarly situate undertrials who are citizens of this country and who are foreigners may not be permissible under the Constitution and even if priority is accorded to the cases of foreigners it may have the effect of foreigners being permitted to jump the queue and slide down cases of citizens even if their cases are old and pending since long. Counsel immediately realised that such a distinction if drawn would result in cases of Indian citizens being further delayed at the behest of foreigners, a



procedure which may not be consistent with law. He, therefore, rightly sought permission to amend the cause-title and prayer clauses of the petition which was permitted. In substance the petitioner now prays that all undertrials who are in jail for the commission of any offence or offences under the Act for a period exceeding two years on account of the delay in the disposal of cases lodged against them should be forthwith released from jail declaring their further detention to be illegal and void and pending decision of this Court on the said larger issue, they should in any case be released on bail. It is indeed true and that is obvious from the plain language of Section 36(1) of the Act, that the legislature contemplated the creation of Special Courts to speed up the trial of those prosecuted for the commission of any offence under the Act. It is equally true that similar is the objective of Section 309 of the Code. It is also true that this Court has emphasised in a series of decisions that Articles 14, 19 and 21 sustain and nourish each other and any law depriving a person of “personal liberty” must prescribe a procedure which is just, fair and reasonable, i.e., a procedure which promotes speedy trial. See Hussainara Khatoon (IV) v. Home Secy., State of Bihar [(1980) 1 SCC 98 : 1980 SCC (Cri) 40] , Raghubir Singh v. State of Bihar [(1986) 4 SCC 481 : 1986 SCC (Cri) 511] and Kadra Pahadiya v. State of Bihar [(1983) 2 SCC 104 : 1983 SCC (Cri) 361] to quote only a few. This is also the avowed objective of Section 36(1) of the Act. However, this laudable objective got frustrated when the State Government delayed the constitution of sufficient number of Special Courts in Greater Bombay; the process of constituting the first two Special Courts started with the issuance of notifications under Section 36(1) on 4-1-1991 and under Section 36(2) on 6-4-1991 almost two years



from 29-5-1989 when Amendment Act 2 of 1989 became effective. Since the number of courts constituted to try offences under the Act were not sufficient and the appointments of Judges to man these courts were delayed, cases piled up and the provision in regard to enlargement on bail being strict the offenders have had to languish in jails for want of trials. As stated earlier Section 37 of the Act makes every offence punishable under the Act cognizable and non-bailable and provides that no person accused of an offence punishable for a term of five years or more shall be released on bail unless (i) the Public Prosecutor has had an opportunity to oppose bail and (ii) if opposed, the court is satisfied that there are reasonable grounds for believing that he is not guilty of the offence and is not likely to indulge in similar activity. On account of the strict language of the said provision very few persons accused of certain offences under the Act could secure bail. Now to refuse bail on the one hand and to delay trial of cases on the other is clearly unfair and unreasonable and contrary to the spirit of Section 36(1) of the Act, Section 309 of the Code and Articles 14, 19 and 21 of the Constitution. We are conscious of the statutory provision finding place in Section 37 of the Act prescribing the conditions which have to be satisfied before a person accused of an offence under the Act can be released. Indeed we have adverted to this section in the earlier part of the judgment. We have also kept in mind the interpretation placed on a similar provision in Section 20 of the TADA Act by the Constitution Bench in Kartar Singh v. State of Punjab [(1994) 3 SCC 569 : 1994 SCC (Cri) 899] . Despite this provision, we have directed as above mainly at the call of Article 21 as the right to speedy trial may even require in some cases quashing of a criminal proceeding altogether, as held by a Constitution



Bench of this Court in A.R. Antulay v. R.S. Nayak [(1992) 1 SCC 225 : 1992 SCC (Cri) 93] , release on bail, which can be taken to be embedded in the right of speedy trial, may, in some cases be the demand of Article 21. As we have not felt inclined to accept the extreme submission of quashing the proceedings and setting free the accused whose trials have been delayed beyond reasonable time for reasons already alluded to, we have felt that deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21. Of course, some amount of deprivation of personal liberty cannot be avoided in such cases; but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21, which has to be telescoped with the right guaranteed by Article 14 which also promises justness, fairness and reasonableness in procedural matters. What then is the remedy? The offences under the Act are grave and, therefore, we are not inclined to agree with the submission of the learned counsel for the petitioner that we should quash the prosecutions and set free the accused persons whose trials are delayed beyond reasonable time. Alternatively he contended that such accused persons whose trials have been delayed beyond reasonable time and are likely to be further delayed should be released on bail on such terms as this Court considers appropriate to impose. This suggestion commends to us. We were told by the learned counsel for the State of Maharashtra that additional Special Courts have since been



constituted but having regard to the large pendency of such cases in the State we are afraid this is not likely to make a significant dent in the huge pile of such cases. We, therefore, direct as under:

(i) Where the undertrial is accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an undertrial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged with more than one offence, the offence providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail shall be to the satisfaction of the Special Judge concerned with two sureties for like amount.

(ii) Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount shall in no case be less than Rs 50,000 with two sureties for like amount.

(iii) Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided



he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.

(emphasis supplied)

(iv) Where an undertrial accused is charged for the commission of an offence punishable under Sections 31 and 31-A of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order.

The directives in clauses (i), (ii) and (iii) above shall be subject to the following general conditions:

(i) The undertrial accused entitled to be released on bail shall deposit his passport with the learned Judge of the Special Court concerned and if he does not hold a passport he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge. In the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial accused;

(ii) the undertrial accused shall on being released on bail present himself at the police station which has prosecuted him at least once in a month in the case of those covered under clause (i), once in a fortnight in the case of those covered under clause (ii) and once in a week in the case of those covered by clause (iii), unless leave of absence is



obtained in advance from the Special Judge concerned;

(iii) the benefit of the direction in clauses (ii) and (iii) shall not be available to those accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses;

(iv) in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner-accused belongs, that the said accused shall not leave the country and shall appear before the Special Court as and when required;

(v) the undertrial accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;

(vi) the undertrial accused may furnish bail by depositing cash equal to the bail amount;

(vii) the Special Judge will be at liberty to cancel bail if any of the above conditions are violated or a case for cancellation of bail is otherwise made out; and

(viii) after the release of the undertrial accused pursuant to this order, the cases of those undertrials who have not been released and are in jail will be accorded priority and the Special Court will proceed with them as provided in Section 309 of the Code.”

(emphasis supplied)



49. The aspect that the directions in *Supreme Court Legal Aid Committee Representing Undertrial Prisoners* (supra), cannot be contended to be only one-time directions in the said case is laid down in “*Anil Kumar @ Nillu*” (supra) of the Co-ordinate Bench of this Court, which verdict has not been challenged by the NCB, wherein observations therein vide paragraph 12 thereof are to the effect:-

“12. A bare perusal of paragraph 16 indicates to this Court that the directions were not meant to be employed as one-time directions in the said case, but were meant to apply as a one-time measure in all cases in which the accused persons were in jail and their trials had been delayed. The intention of paragraph 16 was to convey that despite the absence or presence of delay in trial in a case, the Special Court was still free to exercise its power to grant bail under Section 37 of the NDPS Act. Furthermore, if the Special Court also retained the power to cancel bail if the accused was found to be misusing the same. The directions were certainly not, as the learned APP has submitted, meant to only apply in the case therein, but were directions that were to be followed by Courts in all cases pertaining to NDPS wherein the accused had been subjected to prolonged delay in their trials.”,

to thus lay down that the directions in *Supreme Court Legal Aid Committee Representing Undertrial Prisoners* (supra) as laid down by the Hon’ble Supreme Court are meant to apply as a one-time measure in all cases in which the accused persons are in jail and their trials are delayed and as observed in paragraph 13 in “*Anil Kumar @ Nillu*” (supra), it is unconscionable to state that the rights guaranteed under Article 21 can be subjected to any arbitrary categorization qua offences falling within the ambit of Section 37 of the NDPS Act, 1985



qua trials in which accused persons are at the receiving end of inordinate delay in trial. It is essential to observe that in paragraph 14 of the verdict in *“Anil Kumar @ Nillu”* (supra), it has been observed by the Co-ordinate Bench of this Court to the effect:-

“14. In view of the above, this Court believes that achievement of universal equality before the law requires the tenets of personal liberty to be applicable to all similarly circumstanced individuals and must not be restricted unless according to procedure established by law. This Court does not find any weight in the submission of the learned APP that the aforementioned judgment of the Supreme Court does not apply to the instant case and that the judgement of this Court in Atul Agarwal v. Directorate of Revenue Intelligence (supra) must be referred to a larger Bench due to the incorrect application of the Supreme Court’s judgement. Furthermore, in Atul Agarwal v. Directorate of Revenue Intelligence (supra), this Court had not solely granted bail on the footing of the inordinate delay in trial, but had also considered the twin requirements stipulated under Section 37 of the NDPS Act. Therefore, this Court is of the opinion that the Petitioner herein is squarely covered by judgement of the Supreme Court and is entitled to release on account of inordinate delay in trial and prolonged judicial custody.”

Paragraph 13 of the said verdict reads to the effect:

“13. It is unconscionable to state that the rights guaranteed under Article 21 can be subjected to such arbitrary categorisation and would not apply across the board to all undertrials in NDPS cases who are at the receiving end of inordinate delay in trial. In Re: Sanawar Ali (supra), the Calcutta High Court had comprehensively considered the issue as to whether



the directives in Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) (supra) were only intended to operate as a “one-time measure” and had observed that the directives had been subsequently extended to other states vide Order dated 17.04.1995 in (1995) 4 SCC 695. The relevant portion of the Calcutta High Court judgement is as follows:

"10. It is argued that such directions were intended to operate as an 'one time measure' in the State of Maharashtra. We, however, note that the directives were subsequently extended to the State of West Bengal and other States vide order dated 17th April, 1995 reported in 1995 (4) SCC 695. We are of the view that the aforesaid directives of the Apex Court in the matter of grant of bail due to inordinate delay are required to be taken into consideration and similar relief is to be extended to all undertrials who stand on the same footing. Liberty is an inalienable right of every individual guaranteed by our Constitution and cannot be whittled down by arbitrary categorisation. 'Procedure established by law' under Article 21 cannot be viewed in isolation from the principles of 'equal justice' or 'equality before law' enshrined under Article 14. To achieve such universal equality it is imperative that the directives laid down by the Court in the said report be extended to all undertrials who are similarly circumstanced and are suffering protracted detention throughout the length and breadth of the country. Selective approach to personal liberty is an anathema to our constitutional scheme. Hence, it is the duty of every Court including the High Courts when faced with the question of "bail or jail" to bear in mind the beholden principles of parity and equal access to justice. Courts need to rise above petty technicalities to



preserve and restore liberty to all similarly circumstanced persons. Failure to do so, would create privileged oases of liberty accessible to few and denial of freedom to most."

This Court respectfully concurs with the view laid down in paragraphs 12,13 and 14 of the verdict in “Anil Kumar @ Nillu” (supra).

50. It is essential to observe that in the instant case, the two applicants/accused persons have been incarcerated since 21.05.2014 and a period of more than 8 years has since elapsed and till the date of the last status report filed in Bail Appln. No.4187/2020 dated 10.03.2021, only 13 of the cited 34 witnesses had been examined by the Narcotics Control Bureau and apparently thus, the parameters in *Supreme Court Legal Aid Committee Representing Undertrial Prisoners* (supra) as followed by the Hon’ble Supreme Court with reiteration in “*Thana Singh V Central Bureau of Narcotics*” (2013) 2 SCC 603, as apparently also being the spirit of the verdict of the Hon’ble Supreme Court in “*Baba Fakruddin Sheikh @ Fakru V The State (NCT of Delhi)*” in a Petition(s) for Special Leave to Appeal (Crl.) No.(s). 13/2022, which was against the order dated 25.03.2021 of this Court in Bail Appln. No.334/2021, wherein, bail had been declined whereby, vide judgment dated 16.02.2022, the Hon’ble Supreme Court taking account the factum that the petitioner had suffered incarceration for a period of seven (7) years and six (6) months with the fact that there was no possibility of the trial concluding in the near future, considered it to be a fit case to grant the



bail. The applicants in the instant case thus, fall within the ambit of the verdict of the Hon'ble Supreme Court in ***Supreme Court Legal Aid Committee Representing Undertrial Prisoners*** (supra), ***Thana Singh*** (supra) and ***Baba Fakruddin Sheikh @ Fakru*** (supra). It is essential to observe that in ***Union of India through Narcotics Control Bureau V. Md. Nawaz Khan;*** (supra), the verdict dated 22.9.2021 in Crl. Appeal No. 1043/2021 relied upon on behalf of the NCB, the accused therein were arrested on 16.9.2019 and granted bail vide order dated 1.10.2020 by the Hon'ble High Court of Allahabad whereas in the instant case, the applicants have been in custody for more than 8 years and thus as observed herein above fall within the ambit of the verdict of the Hon'ble Supreme Court in ***Baba Fakruddin Sheikh @ Fakru*** (supra).

51. It is essential to observe that in the facts and circumstances of the instant case, the recovery of the alleged contraband was recovered from the co-accused Eric Jayden of 1.900 Kgs of Methamphetamine in his black coloured Dell bag in his possession in the Swift Dezire Taxi bearing HR66A 4681. The two applicants herein are stated as per the prosecution version to have been present in that Swift Dezire Taxi bearing HR66A 4681 along with Eric Jayden. As regards the reliance that has been placed by the NCB on ***Union of India through Narcotics Control Bureau V. Md. Nawaz Khan;*** (supra) contending to the effect that the applicants who were travelling in the same Swift Dezire Taxi bearing HR66A 4681 as the co-accused Eric Jayden who was in possession of a black coloured DELL bag containing 1.900 Kgs of Methamphetamine, it is essential to observe that in the case relied



upon by the NCB, i.e., *Union of India through Narcotics Control Bureau V. Md. Nawaz Khan*; (supra), the contraband was recovered from a wiper fitted on the front bonnet of the vehicle in which there were three persons present inclusive of Mohd. Nawaz Khan, the respondent to Crl. Appeal No. 1043/2021 who was seated in the said car along with one Mohd. Arif Khan and the driver of the same Rafiuddin, whereas in the instant case, the DELL bag containing 1.900 Kgs of Methamphetamine was in possession of Eric Jayden, the co-accused in a black coloured bag with him. Furthermore, though the trial is yet to conclude, it is essential to advert to the statement of Kailash Yadav, PW-14, the taxi driver of Swift Dezire Taxi bearing HR66A 4681, the extracts of whose testimony had already been adverted to hereinabove, wherein, it has been stated by the said witness, PW-14 in his cross-examination to the effect that the accused Eric Jayden had been firstly picked up by him and he had a black coloured bag and the rest of the two accused persons i.e. the applicants herein were taken on the instructions of the accused Eric Jayden and before taking the applicants, the accused Eric Jayden had gone to the Hotel International Inn. In his examination in chief, the said witness, PW-14 had stated that the accused Eric Jayden had booked a car in the third month of 2014 and he had visited with them to Palam Enclave when his two associates joined him and sat in his taxi and thereafter on their instructions, he reached Hotel International Inn, Mahipalpur and after 10 minutes after waiting in the car he was asked to start the car and in the meantime the door of the car was opened and some NCB officers came and then Eric Jayden and his associates tried to run



away but were caught hold by the NCB officers and thereafter, they were taken to the NCB Office and went on to state that the personal search of Eric Jayden and his associates was taken by the NCB officers at the spot and a black coloured bag was recovered from Eric Jayden, in which was found concealed a white coloured powder substance which came to be 1.900 Kgs at the spot.

52. In the cross-examination conducted by the learned SPP for the NCB, this witness stated that on 21.05.2014, the accused Eric Jayden was picked up in his taxi near Hotel International Inn and taken to Palam Vihar, Bengali Colony, Mahavir Enclave, where he waited for some time outside the house when accused Eric Jayden was inside and after some time, the accused Eric came back with the polythene, besides him, two more black complexion persons came out with Eric with a black coloured bag and were seated in his taxi when he was asked to go to Palam, Mahipalpur and when they reached Mahipalpur, they were intercepted by the NCB Officers.

53. Without any observations on the merits or demerits of the trial that would take place, qua the aspect of conscious possession of the applicants or of the alleged conspiracy between the applicants with Eric Jayden qua alleged possession of 1.900 Kgs of Methamphetamine in the black coloured Dell bag held by Eric Jayden, the said aspects can only be determined on trial. Furthermore, it is essential to observe that the NCB has relied on the statements under Section 67 of the NDPS Act, 1985 of the applicants as their confessional statements qua which in view of the verdict of the Hon'ble Supreme Court in *"Tofan Singh V. State*



*of Tamil Nadu” (2021) 4 SCC 1, a verdict dated 29.10.2020, it is apparent that the said voluntary statements made by the applicants are inadmissible in evidence in view of the verdict of the Hon’ble Supreme Court in *Tofan Singh* (supra) to be made to officers of the NCB who fall within the ambit of ‘police officers’ in terms of Section 25 of the Indian Evidence Act, 1872 and in as much as, there has been no recovery effected from the applicants pursuant to the disclosure statements under Section 67 of the NDPS Act, 1985, the said disclosure statements made by the applicants do not fall within the ambit of admissibility. As regards the contention raised on behalf of the NCB in relation to there being CDRs of mobile phones to show the alleged contact between the applicants, the same *per se* does not inculcate the applicants, and can only be gauged at trial in view of the verdict of the Hon’ble Supreme Court in *State By (NCB) Bengaluru v. Pallulabid Ahmad Arimutta & Anr.* (supra) and as observed *vide para 10 to the effect:**

*“10. It has been held in clear terms in *Tofan Singh Vs. State of Tamil Nadu* that a confessional statement recorded under Section 67 of the NDPS Act will remain inadmissible in the trial of an offence under the NDPS Act. In the teeth of the aforesaid decision, the arrests made by the petitioner-NCB, on the basis of the confession/voluntary statements of the respondents or the co-accused under Section 67 of the NDPS Act, cannot form the basis for overturning the impugned orders releasing them on bail. The CDR details of some of the accused or the allegations of tampering of evidence on the part of one of the respondents is an aspect that will be examined at the*



stage of trial. For the aforesaid reason, this Court is not inclined to interfere in the orders dated 16th September, 2019, 14th January, 2020, 16th January, 2020, 19th December, 2019 and 20th January, 2020 passed in SLP (Crl.) No@ Diary No. 22702/2020, SLP (Crl.) No. 1454/2021, SLP (Crl.) No. 1465/2021, SLP (Crl.) No. 1773-74/2021 and SLP (Crl.) No. 2080/2021 respectively. The impugned orders are, accordingly, upheld and the Special Leave Petitions filed by the petitioner-NCB seeking cancellation of bail granted to the respective respondents, are dismissed as meritless.”

(emphasis supplied)

54. Undoubtedly, vide order dated 13.02.2020, this Court declined Bail Appln. No.1161/2019 of the applicant- Frank Vitus, however, the said order is dated 13.02.2020 and is prior to the interpretation of law and law laid down by the Hon’ble Supreme Court in *Tofan Singh* (supra) vide verdict dated 29.10.2020. The said verdict dated 13.02.2020 of this Court had observed to the effect:-

“

*On a consideration of the rival submissions addressed, it is essential to observe that the facts of the case in *Sujit Tiwari* (supra) relied upon on behalf of the applicant are not at all in pari materia to the facts alleged in the instant case in as much as in the case of *Sujit Tiwari* (supra), the applicant therein was observed to have possibly not been aware of the alleged conspiracy between his brother and two other members of the ship in which the alleged contraband was recovered with the applicant in the said case having sent a list of the crew members. In the instant case, the applicant herein is alleged to have been in the taxi in which the alleged commercial quantity of the contraband was being carried to deliver near Hotel*



International Inn, Mahipal Pur, New Delhi, in relation to which the applicant is alleged to have also made a disclosure statement in terms of Section 67 of the NDPS Act, 1985 that the same is also stated to have since been retracted. In the circumstances qua the prayer made by the applicant seeking grant of bail in relation to the alleged recovery which is of commercial quantity of methamphetamine, it is apparent that the embargo of Section 37 of the NDPC Act, 1985 applies wholly. The prayer by the applicant seeking grant of bail is thus declined.

However, in as much as the applicant is stated to have been incarcerated since May, 2014 with it having been submitted on behalf of the applicant that out of 34 cited witnesses, only 11 of them have so far been examined, the learned trial Court shall make an endeavour to complete the trial in the instant case within a period of six months of the receipt of this order.

The bail application is declined.”

55. As observed hereinabove, the disclosure statements made by the applicants herein i.e. Frank Vitus and Ebera Nwanaforo do not now fall within the ambit of admissibility in terms of Section 67 of the NDPS Act, 1985 in view of the verdict of the Hon’ble Supreme Court in *Tofan Singh* (supra).

56. It is also essential to observe that reliance that the Narcotics Control Bureau has placed on the verdict dated 02.03.2021 of the Co-ordinate Bench of this Court in Bail Appln. No.3065/2020 of the accused Christian Chukwuma, does not assist the Narcotics Control Bureau, in as much as, the co-accused no.4, Christian



Chukwuma had been found in possession of 1.45 Kgs of Methamphetamine as per the prosecution version.

57. Furthermore, it is essential to observe that vide order dated 13.02.2020 of this Court in Bail Appln. No.1161/2019, i.e. the previous application filed by the applicant Frank Vitus, it had been observed as under:-

“.....

.....

However, in as much as the applicant is stated to have been incarcerated since May, 2014 with it having been submitted on behalf of the applicant that out of 34 cited witnesses, only 11 of them have so far been examined, the learned trial Court shall make an endeavour to complete the trial in the instant case within a period of six months of the receipt of this order.

The bail application is declined.”

it is apparent that after the date 13.02.2020 till the submission of the status report by the Narcotics Control Bureau dated 10.03.2021, only two more witnesses were examined other than the eleven (11) witnesses already examined of the prosecution witnesses out of 34 witnesses by the NCB by the date 13.02.2020. Thus, as observed hereinabove, the parameters of the verdict of the Hon’ble Supreme Court in *Supreme Court Legal Aid Committee Representing Undertrial Prisoners* (supra) in terms of directions in paragraph 15(iii) of the said case squarely apply to the instant case.

58. As regards the contention raised on behalf of the Narcotics Control Bureau that the applicants are foreign nationals with no roots



in the society and thus, in terms of the verdict of the Hon'ble High Court of Punjab & Haryana in ***“Daler Singh Vs. State of Punjab” 2017 CrI LJ 2337*** are not entitled to be released on bail, it is essential to observe that it has been observed by this Court in ***“Lambert Kroger Versus Enforcement Directorate” 2000 (53) DRJ 288*** with observations therein to the effect:-

“Though the possibility of fleeing from trial may be more in the case of foreign national. It cannot be said that an accused cannot be granted bail merely because he is a foreign national. There is no law which authorises or permits discrimination between a foreign national and an Indian national in the matter of granting bail what is permissible is that, considering the facts and circumstances of each case, the Court can impose different conditions to ensure that the accused will be available for facing trial”

59. Furthermore, the verdict of the Hon'ble Supreme Court in ***Supreme Court Legal Aid Committee Representing Undertrial Prisoners*** (supra) vide direction Clause (iv) specifically speaks of the grant of the directives in Clauses (i), (ii), (iii) of paragraph 15 vide Clause (iv) to under trial accused persons who are foreigners, wherein, it has been stipulated that in the case of under trial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner-accused belongs, that the said accused shall not leave the country and shall appear before the Special Court as and when required. The said observations



and directive Clause (iv) in paragraph 15 of the verdict of the Hon'ble Supreme Court in ***Supreme Court Legal Aid Committee Representing Undertrial Prisoners*** (supra) itself makes it apparent that accused persons falling within the ambit of Clause (iii) of the verdict in paragraph 15 of the Hon'ble Supreme Court in ***Supreme Court Legal Aid Committee Representing Undertrial Prisoners*** (supra) where they are charged with offences under the Act i.e. the NDPS Act, 1985 punishable with minimum imprisonment of 10 years and with a minimum fine of Rupees one lakh,- cannot be declined the grant of bail merely on the premise that they are foreigners and thus, the submission made on behalf of the Narcotics Control Bureau that because the applicants are foreign nationals, they cannot even be considered to be granted bail,- cannot be accepted.

CONCLUSION

60. Without thus any observations on the merits or demerits of the trial that is in progress, in view of the factum that the applicants have been incarcerated since 21.05.2014 and the dictum of the Hon'ble Supreme Court in ***Supreme Court Legal Aid Committee Representing Undertrial Prisoners*** (supra) and in view of the verdict of the Hon'ble Supreme Court in ***Tofan Singh*** (supra), a verdict dated 29.10.2020 whereby, the statements under Section 67 of the NDPS Act, 1985 made by the accused persons as voluntary/ confessional statements under the NDPS Act, 1985 are no more admissible in evidence, coupled with the factum that the recovery in the instant case was specifically from the co-accused Eric Jayden of the alleged



contraband of 1.900 Kgs of Methamphetamine from a black coloured Dell bag in his possession, the applicants who fall within the ambit of directions (iii) in paragraph 15 of the Hon'ble Supreme Court in ***Supreme Court Legal Aid Committee Representing Undertrial Prisoners*** (supra) and taking into account the verdict of the Coordinate Bench of this Court in ***Atul Aggarwal*** (supra), ***Anil Kumar @ Nillu*** (supra) and the Hon'ble High Court of Calcutta in ***In Re; Sanawar Ali*** (supra) all in totality bring forth that in view of the verdict of the Hon'ble Supreme Court applies in ***Supreme Court Legal Aid Committee Representing Undertrial Prisoners*** (supra) with the principles laid down therein having been reiterated in ***Thana Singh*** (supra) by the Hon'ble Supreme Court, and taking into the directions in paragraph 15(iii) thereof in relation to the aspect of directions for release of undertrial prisoners falling in the category of undertrial prisoners who are charged with the offences punishable under the NDPS Act, 1985 with a minimum imprisonment of 10 years and a minimum fine of Rupees one lakh,- are entitled to be released on bail where they have been in jail for atleast 5 years, subject to terms and conditions as laid down by the Hon'ble Supreme Court, and thus it is directed that the applicants herein i.e. Frank Vitus, the applicant of Bail Appl. No.4187/2020 and Ebera Nwanaforo, the applicant of Bail Appln. No.3705/2020 are allowed to be released on bail on their filing a bail bond in the sum of Rs.1,00,000/- (Rupees One Lakh) each with two sureties of the like amount each to the satisfaction of the learned Special Judge, NDPS, Delhi concerned, where the trial is in progress with directions to the effect that:-



- their passports be impounded and they submit their respective undertakings to the effect that they shall not leave the country;
- the learned Special Judge, NDPS seized of the trial in SC No.27/14 shall ensure that the certificate of assurance from the High Commission of Nigeria is placed on record that the applicants/accused shall not leave the country and shall appear before the learned Special Judge as and when required, in as much as, the complaint filed by the Narcotics Control Bureau under Sections 8/22/23/29 of the NDPS Act, 1985 indicates that the applicants are residents of Nigeria;
- they shall appear before the Narcotics Control Bureau Office, New Delhi during the period that they have been released on bail once a week on each Monday at 4:00 PM in terms of directive (ii) in paragraph 15 of the verdict of the Hon'ble Supreme Court in *Supreme Court Legal Aid Committee Representing Undertrial Prisoners* (supra), which reads to the effect:-

(ii) the undertrial accused shall on being released on bail present himself at the police station which has prosecuted him at least once in a month in the case of those covered under clause (i), once in a fortnight in the case of those covered under clause (ii) and once in a week in the case of those covered by clause (iii), unless leave of absence is obtained in advance from the Special Judge concerned;



- in terms of the directive in paragraph 15(iv) of the verdict of the Hon'ble Supreme Court in *Supreme Court Legal Aid Committee Representing Undertrial Prisoners* (supra) they shall not leave the country;
- they shall not leave the city of Delhi/New Delhi;
- they shall appear before the Court of the learned Special Judge, NDPS as and when required and shall not leave the city of Delhi;
- they shall keep their mobile phones on at all times;
- they shall drop a PIN on the google map to ensure that their location is available to the Investigation Officer of the case;
- coupled with the directive that the applicants during the period that they are on bail, shall commit no offence whatsoever;
- in the event of there being any FIR/ DD Entry/ Complaint lodged against them, the Narcotics Control Bureau would be entitled to seek the cancellation of bail of the applicants.

The applications, i.e., Bail Appl. No.4187/2020 and Bail Appl. No.3705/2020 are disposed of accordingly.

Nothing stated herein shall however amount to an expression on the merits or demerits of the trial that is in progress.

ANU MALHOTRA, J.

MAY 31, 2022
SV/NC